



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 5, 1996

Mr. Patrick S. Dohoney
Assistant District Attorney
Tarrant County
Justice Center
401 West Belknap
Fort Worth, Texas 76196-0201

OR96-0888

Dear Mr. Dohoney:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act. Your request was assigned ID# 39458.

The Tarrant County Sheriff's Department (the "county") received several written requests for all evidence, including any photographs, official reports, and the names of persons who witnessed actions associated with the death of an incarcerated individual. You have released section I of the custodial death report, but contend that all other requested information is excepted from disclosure by section 552.101 and 552.103 of the Government Code. You have provided for our review a copy of the requested information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The county has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The county must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 452 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. *Id.*; *see also* Open Records Decision Nos. 555 (1990), 346 (1982). Additionally, in Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a "notice of claim" letter *and* the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance or statute. However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does *not*, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

The requests for information in this instance were made by an attorney who represents the family of a deceased individual, and by the father of the deceased individual. In addition to the request for information, the attorney has also sent the county a "notice of claim" letter that alleges "injuries and damages as a result of [the county's] negligence." The notice of claim letter further requests the county to turn the matter over to its insurance carrier and states that the requestor/attorney has "an assignment of interest in this claim." Based on this evidence, this office finds that litigation is reasonably anticipated¹ and that the requested information is related to the anticipated litigation. Therefore, you may withhold the requested information under section 552.103.²

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue. Section 552.103 is intended to protect the litigation interests of a governmental body by forcing parties that are or may be in litigation with a governmental body to obtain information relating to the litigation through the discovery process, if at all. Open Records Decision No. 551 (1990) at 3. The litigation exception was intended to prevent the use of the

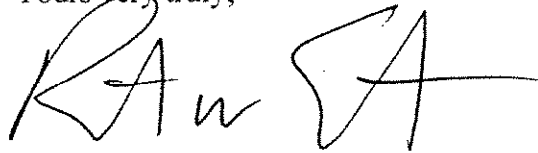
¹The county has not made an affirmative representation that the notice of claim letter complies with the requirements of the TTCA, and thus has not met the test set forth in Open Records Decision No. 638 (1996) to determine that litigation is reasonably anticipated. Nonetheless, this office finds that based on the specific facts in this situation, the county has provided sufficient evidence to establish that litigation is reasonably anticipated under section 552.103 of the Government Code.

²Because we find that you may withhold the requested information under section 552.103 of the Government Code, we do not address your contention that the information is excepted from disclosure under section 552.101.

Open Records Act as a method to avoid discovery rules. *Id.* at 4. Once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and that information may not be withheld under this exception. *Id.*; *see also* Open Records Decision Nos. 454 (1986), 349 (1982), 320 (1982), 288 (1981). If the opposing party in this potential litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'RWS' followed by a stylized flourish.

Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/rho

Ref.: ID# 39458

Enclosures: Submitted documents

cc: Mr. Charles Merriman
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(w/o enclosures)

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(w/o enclosures)